IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 24/1759 COA/CIVA

IN THE MATTER OF: **AN APPEAL FROM THE SUPREME COURT OF THE REPUBLIC OF VANUATU**

BETWEEN: **PAKEA LIMITED**
Appellant

AND: **WENDY BOURDET AS THE ADMINISTRATRIX OF THE ESTATE OF JIMMY JONES, CLIFF JONES and JAY JONES**
Respondent

Date of Hearing:	***7 November 2024***
Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice M O'Regan*** ***Hon. Justice R White*** ***Hon. Justice O Saksak*** ***Hon. Justice V M Trief*** ***Hon. Justice E Goldsbrough*** ***Hon. Justice M A MacKenzie***
Counsel:	***Mr R Sugden for the Appellant*** ***Mr R Tevi for the Respondent***
Date of Decision:	***15 November 2024***

JUDGMENT

Introduction

1. This was an appeal against the Supreme Court judgment dated 23 May 2024 dismissing the claim for VT 8,265,000 for the expenses incurred over the years, together with general damages of VT 14,000,000. As the primary judge said, the appellant sought general damages for trespass, harassment, threatening illegal fishing, unpaid fees for grazing cattle, losses suffered by Kwakea Island Adventures and expenses for the delay and inability to enjoy his leases over Pakea Island.

2. The primary judge also entered judgment on the counterclaim in favour of the respondents in the sum of VT 17,500,000 to be paid immediately with 10% interest (as agreed in the sale and purchase agreement) for late settlement. Interest was to run from 14 December 2015 (date of consent orders) until payment.

3. The proceeding relates to a lease title covering Pakea Island in Torba Province. It was not in dispute that:

a) The late Jimmy Jones was the original leasee of Lease title 02/07112/001 (the Head Lease)

b) On 30 November 2007, the appellant entered into an agreement with Jimmy Jones for the purchase of the Head Lease. As part of the agreement, the Head Lease was to be surrendered and two new lease titles created; an agricultural lease and a commercial lease.

c) The total agreement purchase price was VT 47,000,000. The purchase price was partially satisfied by the payment of VT 29,500,000 (including house and land, a boat and a vehicle).

d) It was agreed that the outstanding balance of VT 17,500,000 was to be paid once the Head Lease was surrendered and the two new Leases created. This occurred in approximately June 2008. However, the two new Leases, being lease title 02/0172/002 (agricultural lease) and lease title 02/0712/003 (commercial lease) were not registered until 28 January 2020.

4. In civil case no.185 of 2015, the late Jimmy Jones filed a claim to seek payment of the VT 17,500,000 outstanding under the sale and purchase agreement. The claim was resolved by a consent order dated 14 December 2015. The terms of the consent order provided that a "*final and conclusive*" sum of VT 17,500,000 was to be paid upon registration of both the agricultural and commercial leases to the appellant.

5. The present claim was filed on 19 November 2020. The appellant asserted that it incurred expenses totalling VT 8,265,000 as a result of the respondents' actions, which included dealing with issues in relation to the registration of the leases, trespass by the respondents' family members, failure to pay for the grazing of cattle, harassment and threats and in addition claimed business losses by Kwakea Island Adventures due to the actions of the respondents' family.

6. The respondents filed a defence and a counterclaim on 3 May 2021. The defence disputed a number of matters particularised on the claim. The counterclaim related to the non-payment of the outstanding balance of the purchase price, VT 17,500,000, as provided for in the consent order dated 14 December 2015. Given the delay in payment, damages and interest at 10% for late settlement was sought by the respondents.

The hearing

7. There were a number of attempts to hear the claim and counterclaim at a trial in 2022 and 2023.[1] On one occasion in 2022, the trial was adjourned because the appellant's counsel filed a notice of ceasing to act the day prior to the trial. Another trial was adjourned in 2023 due to the unavailability of the appellant's witnesses. Due to these difficulties, the parties agreed to proceed by filing agreed facts and issues, together with submissions and for a judgment to be issued on the papers. On 1 February 2024, the primary judge made directions reflecting the agreement. Only the respondent filed submissions. The appellant did not file the agreed facts and issues or submissions.

[1] *The history is set out at paragraphs 12-14 of the judgment*

8. The judgment, determined on the papers, was issued on 23 May 2024.

Appeal Grounds and Submissions

9. The appeal was advanced on a number of grounds. They can be distilled into four grounds. First, that the primary judge erred by making the 1 February 2024 order that the proceeding would be determined on the papers. It is argued that there was no jurisdiction to make the order, and that it took away the parties' right to a trial. Second, that the primary judge erred in assessing the evidence by rejecting the appellant's evidence without providing any reasons, and by making a finding adverse to the appellants unsupported by any evidence. Third, that the Court should not have given judgment without inquiry or notice to the appellant as to why it had not complied with the timetabling order to file the agreed facts and submissions. Fourth, that the primary judge was wrong to enter judgment for the respondents in relation to the counterclaim.

10. The respondents' Counsel Mr Tevi submits that counsel conceded that the Court could determine the proceeding on the papers because the "*matter has dragged on for so long*". He submits that the primary judge did not err in awarding interest on the VT 17,500,000 payable under the consent orders in civil case no.185 of 2015.

Did the primary judge err by making an order that the proceeding would be dealt with on the papers?

11. Mr Sugden submits that the primary judge did not have jurisdiction to make the order that the proceeding would be dealt with on the papers. While Mr Sugden acknowledges that under rule 12.1 of the Civil Procedure Rules ("CPR"), the Court may give directions about the conduct of a trial, he submits that the directions do not extend to doing away with the hearing altogether. He argues that in a civil trial, the protection of the law guaranteed in article 5(1)(d) of the Constitution must include the right for the Court hearing a proceeding to conduct the proceeding judicially. Further, that conducting a proceeding judicially at the minimum includes ensuring that natural justice is afforded to the parties. This must include the right to cross examine.

12. We do not accept the argument that the Court lacked the jurisdiction to order that the proceeding would be dealt with on the papers.

13. Part 12 of the Civil Procedure Rules provides for the conduct of a trial when the parties are in attendance. However, Part 12 does not limit the Court's jurisdiction to determine a proceeding without a trial with evidence and cross examination. While there is no specific rule in the Civil Procedure Rules regarding method of trial, pursuant to s 28(1)(b) and s 65(1) of the Judicial Services and Courts Act [Cap 270], the Supreme Court has jurisdiction to administer justice in Vanuatu, and such inherent powers as are necessary to carry out its functions. Rules 1.2 and 1.7 of the Civil Procedure Rules give the Supreme Court wide powers to make such directions as are necessary to ensure that matters are determined in accordance with natural justice.

14. The Court's powers must include how a hearing, or a trial is conducted to ensure substantial justice. A trial with the parties attending to give oral evidence will not always be required or necessary. It will depend on the circumstances of the case. In the present case, counsel invited the court to determine the proceeding on the papers. This process was not foisted on them. They consented to the hearing being conducted in that manner because of the difficulties in holding a trial, which the primary judge carefully recited in the judgment. By their agreement, counsel

waived the right to cross examine the witnesses. They did so in the knowledge that there were disputed facts, as was evident from the pleadings and sworn statements.

15. Because there were conflicts in the evidence, this may not have been an appropriate case for a hearing on the papers. In making that observation, we are not critical of the primary judge. There were significant delays and difficulties in holding a trial and relevantly, the judge was invited by counsel to adopt the approach he did.

16. While the primary judge in this matter acceded to the request to determine the proceeding on the papers, it is within a judge's discretion to decline to adopt such an approach and direct a full trial. As was recently said by this Court in *Hiwa v Family Niatgei* [2024] VUCA 36, disputed facts cannot be determined by reading sworn statements.

17. For the reasons discussed, there is jurisdiction to direct a hearing on the papers. The primary judge did not err in doing so.

Assessment of the evidence

18. We see no error in how the primary judge assessed the evidence. It was open to the judge to infer that the claim had been filed to avoid or delay payment of the balance of the purchase price. The agreement was entered into 17 years ago, and a substantial sum of money remains outstanding. In considering whether the claim was proved, the primary judge preferred the respondents' evidence and gave adequate reasons for doing so. As is evident from the judgment, the judge mainly relied on independent evidence in his assessment of the evidence.

Lack of compliance with the timetabling directions

19. Mr Sugden's submission that the primary judge erred by not making an inquiry of counsel as to why the timetabling directions had not been complied with prior to issuing the judgment lacks merit. It was counsel's responsibility to comply with the timetabling directions made by the primary judge and to file the agreed facts and issues and submissions.

Conclusion

20. None of the appeal grounds in relation to the dismissal of the claim are made out.

Did the primary judge err by making an order for payment of interest/damages on the counterclaim?

21. The basis for the counterclaim is that despite the consent order made on 14 December 2015 in the civil case no.185 of 2015, the judgment sum remains unpaid. The consent order did not provide for interest if payment was not made in accordance with the consent order. The counterclaim sought general damages and interest at 10% as relief.

22. In his written submissions, Mr. Sugden said that the principle of res judicata applied to the claim for interest and damages in relation to the balance outstanding under the sale and purchase agreement, given the consent order made in 2015. What was sought in the counterclaim was

enforcement of the order made in 2015. Further, the primary Judge held that the 10% award of interest was made because of the terms of the sale and purchase agreement. However, the terms of the contract had merged with the consent orders which thereafter determined the parties' rights pursuant to the contract.

23. There is a helpful discussion of the doctrine of merger in an English case, *Zavarco PLc v Nasir* [2020] EWHC 629:

> *"Merger – the law*
>
> *12. Before getting into the legal theory, it is worth setting out the easy example which illustrates merger. If a claimant has a cause of action which gives them a legal right to a sum of money from a defendant (e.g., a claim for breach of contract), then before judgment is given, the claimant's legal right is that which the law provides for as arising from the cause of action. The parties may disagree about the merits of the claimant's right and go to trial. Assuming the claimant wins the trial, they will obtain a judgment ordering the defendant to pay them that sum of money. The claimant now has a legal right to the money from the defendant, based on the judgment itself. This new legal right is different from the old one. For example, the way the limitation rules apply differs and the accrual of interest may well be different too. If you think about it, the claimant cannot still have their old legal right to the sum of money for breach of contract, otherwise they would now have two rights and might end up with a right to double recovery. So, the idea is that the old right, or cause of action, has merged into the new right, the judgment. Whether "merger" is the best metaphorical description of this idea does not matter. It makes sense.*
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> *13. Merger is similar to but not the same as other doctrines which come into play when a party or a dispute comes back to a court a second time after a previous decision. They include res judicata, issue estoppel and the rule in* ***Henderson v Henderson****. In* ***Virgin Atlantic Airways v Zodiac Seats*** *[2013] UKSC 46, [2014] AC 160 Lord Sumption deals with this at paragraph 17. He said as follows:*
>
> > *"17. Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle.*
> >
> > *The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.*
> >
> > *Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336.*
> >
> > *Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it,*

and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, section 34.

Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197-198.

Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.

Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."
[sentences separated out for clarity]"

24. We accept Mr Sugden's argument about the counterclaim. The 2015 consent order determined the cause of action for payment of the VT 17,750,000 outstanding under the sale and purchase agreement. The right to payment of the outstanding balance under the agreement for sale and purchase has merged into the new right, the consent order. There is no common law cause of action for enforcement of a judgment. The respondents' remedy is to either continue with enforcement action, or to apply to re-open the proceeding to seek interest and damages given that the length of time the VT 17,500,000 has been outstanding.

25. Therefore, the primary judge erred in entering judgment on the counterclaim and making an order for payment of interest and damages. This ground of appeal succeeds.

Conclusion

26. The appeal is allowed in relation to the counterclaim. The order for payment of interest and damages is set aside and is quashed.

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Disposition of the appeal

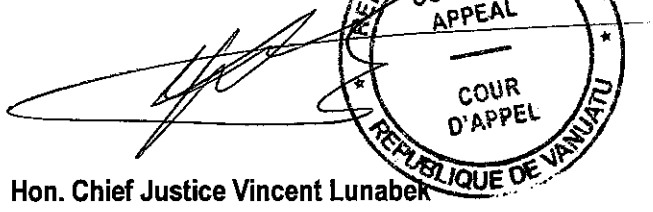
27. The appeal in relation to dismissal of the claim is dismissed.

28. The appeal in relation to the counterclaim is allowed. The order for payment of interest and damages is set aside and quashed.

29. Each party has partially succeeded in the appeal. Therefore, there is no order for costs.

DATED at Port Vila, this 15th day of November, 2024

BY THE COURT



Hon. Chief Justice Vincent Lunabek